SUPREME COURT, U. S.

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No. 1136

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

AERO MAYFLOWER TRANSIT CO., INC.,
Appellant,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

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ARGUMENT

I

The Decision Below Rests Upon An Erroneous Legal Standard

Appellees admit that under this Court's holding in *Thomson* v. *United States,* 321 U.S. 19, the critical question in determining whether lessor or lessee of a motor vehicle has performed the single coordinated

transportation service is which of the two held itself out to the public as offering the service. (M.A. 5).[1] They assert, however, that all of appellant's evidence was directed to its claim under Section 306(a)(4) for authority to transport goods between places in the contiguous forty-eight states and places in Alaska, and that it "offered no evidence to establish that it had ever held itself out to perform . . . significant transportation services between points in Alaska." (*Ibid.*) That contention demonstrates a misunderstanding of the fact that appellant's transportation service between points within Alaska was but a part of its overall, through service from origin to destination (T. 54-55); therefore, all evidence regarding appellant's overall operations was also evidence of its operations within Alaska, and was so considered by the examiners (J.S. 7a-8a).

Both appellees and intervenors cite *Andrews Van Lines* v. *United States*, 240 F. Supp. 763 (D. Neb. 1965), *aff'd per curiam*, 382 U.S. 67, and *United States Van Lines* v. *United States*, 249 F. Supp. 984 (E.D. Mo. 1965), to support their contentions that appellant's agency arrangement with Alaska Van & Storage did not suffice to make Alaska Van's operations those of appellant. (M.A. 5; I.M.A. 2-3). But neither of those cases involved appellant at all, and the very reason this appeal is necessary is that the Commission decided appellant's rights on the evidence pertaining to other carriers. The facts of the *Andrews* and *United*

[1] References to "M.A." herein are to the Motion to Affirm filed by the United States and the Interstate Commerce Commission (herein called appellees); the Motion to Affirm by North American Van Lines, Alaska Orient Van Service, and Smyth Overseas Van Lines, Inc. (herein called intervenors) is designated "I.M.A."

States Van cases are separate and distinct and differ from the facts of record in support of appellant's application.[2]

Appellees assert that there is no evidence to show that appellant "assumed full responsibility" for its operations within Alaska or that appellant "assumed the risks" of its Alaska operations. (M.A. 5-6). On the contrary, the record clearly shows that appellant assumed complete responsibility for all its shipments to and from Alaska, including the payment of all claims and expenses of the transportation. (T. 776, 740).

Finally, both appellees and intervenors argue that Alaska Van & Storage has already been granted a certificate on the basis of the "very operations" relied on by appellant, and that under the doctrine of *United States* v. *Rosenblum Truck Lines,* 315 U.S. 50, 56, a second certificate for the same operation is impermissible. (M.A. 2, 4-5; I.M.A. 3). The short answer is that there is not substantial evidence in the record to support a finding that the transportation services upon which appellant predicates its application for grandfather authority are the same transportation services for which Alaska Van & Storage was granted such a certificate. In fact, there is no direct evidence whatsoever in the record that the two applications overlapped (see T. 719), and it would be totally erroneous

[2] Although the Mollerup proceeding resulted in a single opinion containing generalized findings purporting to apply to all applicants for Section 306(a)(5) authority (J.S. 1a), each of the nineteen applicants, including appellant, made a separate presentation of evidence in support of its application, and the evidence of one applicant had no relevance to any other. Thus, each appeal from the single order must necessarily be predicated on the peculiar facts regarding that appellant's application.

to infer such a conclusion, since Alaska Van is a common carrier in its own right and performs many transportation operations of its own, including interline services for U. S. Van Lines and other common carriers. For all that appears in the record, its application for grandfather authority may well have been based solely on those operations,[3] and *Thomson* suggests that it is quite permissible to grant an agent grandfather authority on the basis of operations other than those performed for the primary carrier (321 U.S. at 25-26).

An additional complete answer is that such a contention evidences an obvious misunderstanding of the *Rosenblum* holding. In that case neither of the carriers participating in the transportation service had previously been awarded a grandfather certificate for such service. Therefore the Court's preliminary holding that a single set of operations justifies only one grandfather certificate did not automatically eliminate one of the carriers from consideration, but only narrowed the essential question to which of the two carriers should receive the one certificate.

The case at bar presents a significantly different question. Since Alaska Van has already been granted a certificate, the question in this case is not which of the two carriers should receive a grandfather certificate for their allegedly mutual operations, but whether appellant is precluded from receiving such a certificate by the mere fact that Alaska Van has been previously certificated for such operations. The contention of

[3] Such a conclusion is bolstered by the fact that an agent of Alaska Van appeared in support of appellant's application (T. 767) and testified that all the shipments relied upon by appellant were in fact Mayflower shipments (T. 767, 772).

appellees and intervenors, if accepted, would deny appellant a hearing on the merits of its application by making its right to a certificate contingent on the outcome of a prior proceeding in which it was not heard. *Alaska Van & Storage, Alaska Grandfather Application,* 94 M.C.C. 381 (1964).[4]

Rosenblum did not so hold. On the contrary, once it is established that an applicant qualifies for a Section 306(a)(5) certificate, the certificate must be issued forthwith, and the fact that another carrier has previously qualified, on the basis of what are alleged to have been the same operations, is no ground for refusing to issue the second authorization. See *Alaska Van & Storage Co.* v. *United States,* 240 F. Supp. 501, 503 (D. Alaska 1965), in which a three-judge court held that the Commission, having found two applicants qualified for grandfather authority even though on the basis of what it asserted to be the same operations, could not refuse to grant two authorizations:

> "[T]he Commission having found that each of the applicants met the requirements of the Act and having found each of them to be entitled to a certificate authorizing such operations, was required by the mandatory wording of the statute

[4] Even though appellant did not participate in the prior proceeding in any way, appellees assert that Mayflower "had notice" of Alaska Van's application (M.A. 4). While that is technically true, appellant certainly had no reason to suspect that its agent was going to rely on appellant's operations in support of its own application, and hence had no reason to intervene in that proceeding. On the contrary, during the time that application was pending, Alaska Van was cooperating fully with appellant in this proceeding (T. 767), and for the agent to have asserted rights of its own on the basis of its services for appellant would have contravened at least the spirit if not the letter of the exclusive agency agreement between the two companies.

to issue a certificate to each applicant 'without further proceeding.'"

This appeal is not a collateral attack as appellees and intervenors contend (M.A. 4; I.M.A. 3), but an assertion of rights clearly granted by statute. Any error by the Commission in another case should not be permitted to prejudice the appellant's clear right herein.[5]

II

The Findings Upon Which the Examiners Disposed of the Applications Are Not as to This Appellant Supported by Substantial Evidence

Appellees totally ignore appellant's specific objections that several of the examiners' findings are not supported by substantial evidence. The generalized assertion that these contentions were considered and rejected by the court below (M.A. 6) is no answer at all; the question is whether that court's action was proper.

Intervenors cite a number of facts which allegedly support the examiners' ultimate finding that the Alaska-based carriers dominated and controlled all the Alaska operations in question. (I.M.A. 3-4). How-

[5] Intervenors also allege that appellant is precluded from raising its wrong-legal-theory contention here because it did not do so before the Commission. (I.M.A. 5). This is a mere play on words. Appellant's evidence before the examiners went to the question of a "single coordinated transportation service" as well as to that of "direction and control." Further, in all of its various motions before the Commission as well as in its complaint and briefs to the district court, appellant has contended that the examiners erred in refusing to grant it a Section 306(a)(5) certificate on the basis of its agent's operations in Alaska. United States v. Tucker Truck Lines, 344 U.S. 33, 36-37, relied on by intervenors, does not require a more explicit statement to preserve the point for appeal.

ever, very few of the facts enumerated by the intervenors were cited by the examiners as a basis for their conclusion,[6] and none of the specific findings challenged by appellant are even mentioned in the intervenors' brief. Intervenors have thus in effect, by their silence, admitted that many of the facts found by the examiners to constitute a basis for their conclusion are not, as to appellant, supported by substantial evidence; they have then asserted new facts, not found by the examiners, to buttress that conclusion. Such a stratagem ignores the fundamental rule that ultimate administrative findings must be supported by basic findings explicitly set forth in the opinion. *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 167; *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 533. When sufficient basic findings are not set forth, or when the basic findings that are set forth are found to be erroneous, the ultimate finding must be discarded. *Secretary of Agriculture* v. *United States,* 350 U.S. 162, 167. The record may not be searched for additional facts sufficient to form a basis for the conclusion. *Atchison, T. & S.F. Ry.* v. *United States,* 295 U.S. 193, 201-02.

Additionally it should be noted that the picture which intervenors paint of appellant's Alaska opera-

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[6] Among the "new" facts cited by the intervenors, but not found by the examiners, are the following: That the trucks used in Alaska were registered in the name of Alaska Van; that Alaska Van paid the public liability insurance; that the agent "determined the schedule of loading and unloading"; that appellant "did not concern itself with the Alaska operations" but only paid a "straight fee" for its agent's services; that the vehicles used were inspected by Alaska Van; that none of the agent's employees or facilities had been "submitted for approval" by appellant since 1957; that "no logs, safety reports, or medical examination reports" were submitted to appellant by the drivers; and that Mayflower had no license to do business in Alaska.

tions very closely parallels the description in the record of North American Van Lines' operations in the United States (T. 595-97, 748), and comports with the standard operating procedures of all national household goods movers. Acquisition of supplementary vehicles by means of equipment leases has been approved by the Interstate Commerce Commission (T. 597) and is regulated by that body as a means of assuring control of leased vehicles in the lessee, so as to bring such vehicles within the Commission's authority (see J.S. 19, n.3). Appellant's lease agreements with its agent Alaska Van & Storage were in strict conformance with these regulations. See 49 C.F.R. 207.4(4)(ii).

Finally, appellees assert that appellant's substantial evidence point does not present "a substantial question for this Court's determination." (M.A. 6). To the extent this statement is intended to suggest that the question is not one of general importance, it is sufficient to note that a case coming to this Court on appeal, as this one does, stands on a different footing from one presented on application for writ of certiorari. For an appeal the appellant need not show importance in any general sense; it is enough that he show a substantial possibility of error affecting his own interests. This appellant has done.

CONCLUSION

For the foregoing reasons, appellant respectfully suggests that the issues presented by this appeal are so substantial that they warrant plenary consideration by this Court.

Respectfully submitted,

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PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.